COVID-19 –
the Latest Local, State and
Federal Mandates
Impacting the Workplace

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As the new coronavirus (COVID-19) spreads in the United States, employers are taking a variety of precautions to protect their workplaces while still trying to conduct business.

There is NO UNIFORM path forward. Different industry, geographic area, and workforce needs vary greatly. Also, the situation is fluid and changes by the hour. DO NOT think there’s a precise “right way” of handling this situation for your workplace.

Your business may be limited by local, state and federal mandates already in place or that could be in place in the days and weeks to come. We must be flexible and creative in these times.

The purpose of this discussion is to educate you regarding COVID-19 and to provide you with an understanding of your rights and responsibilities as an employer.

The 2 most important things to keep in mind from a business perspective: 1) the health, welfare and safety of everyone (employees, contractors, customers, suppliers, the public, etc...) and 2) the ability to operate your business as effectively as possible.
The latest to discuss/review...

- H.R.6201 – summary and status
- Mandated Business Closures (i.e. bars & restaurants)
- Non-Essential Business Closures
- School Closings – impact on available workforce
- Unemployment Developments
- Paid Sick Leave Mandates
- Remote Work Options/Issues
- Furloughs vs. Layoffs – refresher
- WARN Considerations
H.R.6201 – Trump Signed Into Law!
Families First Coronavirus Response Act

The mandates focus on three (3) primary areas that employers must IMMEDIATELY pay close attention to: 1) PAID LEAVE; 2) EXPANSION OF FMLA LEAVE; and 3) EXPANSION OF UI BENEFITS (including the possible extension of UI benefits beyond 26-weeks). The mandates are set to expire on December 31, 2020.
HR6201

Paid Sick Leave:

- All private sector employers with LESS THAN 500 employees and all government employers must pay any employee 2-weeks of paid leave (up to 80 hours for full-time workers, and the average number of hours over a standard 2-week period of time for part-time workers).
- All private sector employers with 500 OR MORE employees (regardless of location) are exempt.
- Paid sick leave will be provided to any employee who is not able to work or able to work remotely ("telework") under the following circumstances:
  - Subject to a government quarantine or isolation order related to COVID -19;
  - Been advised by health provider to self-quarantine due to COVID -19;
  - Experiencing symptoms of COVID -19 and seeking a medical diagnosis;
  - Caring for an individual subject to quarantine order or self-quarantine;
  - Caring for children if schools are closed or their caregiver is unavailable because of a public health emergency; or
  - A “catch all” category for other substantially similar conditions as may be specified by the Secretary of Health and Human Services in consult with other federal agencies.
Paid Sick Leave:

- Employers with less than 50 employees may be exempt from this paid sick leave mandate. The U.S. DOL will publish regulations that will guide small employers on the exemption process. The exemption will be triggered if the “viability” of the business is in jeopardy --- due to the mandates. There is also an exemption for healthcare workers and emergency responders.

- Such paid sick leave appears to be NOT in addition to other paid sick leave policies or local/state mandates. Also, there is nothing prohibiting an employer from changing its voluntary paid time off policies after the effective date.

- The amount of paid leave is capped. Employees are compensated at the higher of their regular rate of pay, the federal minimum wage, or the local minimum wage, but not to exceed $511 per day and $5,110 in the total.

- However, if an employee must care for a sick family member, a child unable to attend school, or because they meet the criteria for “similar conditions,” then they are to be paid 2/3rds of the rate of their regular rate of pay, but not to exceed $200 per day and $2,000 in total.

- Each quarter, private sector employers are entitled to a tax credit equal to 100% of the qualified sick leave wages paid. The tax credit will be applied against the employer’s Social Security taxes.
Due to concerns over an employer’s cash flow, the U.S. Treasury Secretary has broad regulatory authority to help employers meet their financial obligations while awaiting the tax credit.

The employer can also seek a tax credit to offset any costs of continuing to provide health insurance while the worker is utilizing this benefit.

The payments made under this mandates are not considered wages for Social Security payroll tax purposes.

Interestingly, the self-employed can also receive the same tax credits as if they were employed by an employer under the new paid sick leave mandate.
Paid Family and Medical Leave (FMLA):

- All private sector employers with LESS THAN 500 employees and all government employers must provide any employee (who has been employed for 30 calendar days or more) up to 12 weeks of paid family and medical leave (FMLA) in order to care for children (under 18), if and when: a) schools are closed or daycare is unavailable because of the current emergency and b) the employee is unable to work or work remotely (“telework”).
- There is no 75 mile radius or hours worked requirement.
- All private sector employers with 500 OR MORE employees (regardless of location) are exempt.
- After 10 days (or what would likely be the equivalent of the paid sick leave mandate as summarized above), an eligible employee would be entitled to additional pay at the rate of 2/3rds his or her regular rate of pay.
Paid FMLA Leave:

- Employers with less than 50 employees may be exempt from this paid leave mandate. The U.S. DOL will publish regulations that will guide small employers on the exemption process. The exemption will be triggered if the “viability” of the business is in jeopardy --- due to the mandates. Further, such employers will not be subject to civil penalties for violating this leave mandate. There is also an exemption for healthcare workers and emergency responders whereby their employers may exclude them at the employer’s discretion.

- Such leave appears to be NOT in addition to other sick leave policies or local/state mandates. Also, there is nothing prohibiting an employer from changing its voluntary leave policies after the effective date.

- The paid leave component here is also capped. The caps are $200 per day and $10,000 in total.

- Each quarter, private sector employers will be entitled to a tax credit equal to 100% of any paid FMLA benefits.
HR6201

Paid FMLA Leave:

- Again, due to concerns over an employer’s cash flow, the U.S. Treasury Secretary has broad regulatory authority to help employers meet their financial obligations while awaiting the tax credit.
- The employer can also seek a tax credit to offset the costs of continuing to provide health insurance while the employee is on this leave.
- Paid sick leave is not considered wages for Social Security payroll tax purposes.
- Self-employed individuals can also receive the same tax credits as if they were employed by an employer under the new paid sick leave mandate for up to 50 days.
HR6201

Unemployment Benefits Expansion:

- The federal government is allowing and encouraging states to be more flexible with respect to eligibility.
- The federal government will provide states $1 Billion in additional funding for UI benefits.
- HR6201 also authorizes states to extend unemployment benefits beyond 26 weeks should they experience higher levels of unemployment.
Objectives in Formulating Response to COVID-19

- All employers need to consider how best to decrease the spread of acute respiratory illness and lower the impact of COVID-19 in their workplace, while trying to maintain operations to the greatest extent possible.
Objectives in Responding to COVID-19

- Reducing transmission
- Protecting people who are at higher risk for adverse health complications
- Maintaining business operations
- Minimizing adverse effects on other entities in supply chain

***While workplace wage/hour mandates, discrimination, termination and other traditional HR and legal regulatory requirements are secondary at this point in time... THEY ARE IMPORTANT TO STILL RECOGNIZE AND NOTE. The Plaintiff’s Bar is paying attention and already advertising services related to COVID-19.***
Essential vs. Non-Essential Biz…

Per PA Gov. Tom Wolf’s Request…

- Non-essential businesses include public-facing industries such as entertainment, hospitality, and recreation facilities, including but not limited to community and recreation centers; gyms, including yoga, barre and spin facilities; hair salons and barber shops, nail salons and spas; casinos; concert venues; theaters; sporting event venues and golf courses; retail facilities, including shopping malls except for pharmacy or other health care facilities within retail operations.

- Essential services and sectors include but are not limited to food processing, agriculture, industrial manufacturing, feed mills, construction, trash collection, grocery and household goods (including convenience stores), home repair/hardware and auto repair, pharmacy and other medical facilities, biomedical and healthcare, post offices and shipping outlets, insurance, banks, gas stations, laundromats, veterinary clinics and pet stores, warehousing, storage, and distribution, public transportation, and hotel and commercial lodging.
Essential vs. Non-Essential Biz...

- IL Governor issued EO 2020-07 banning public and private gatherings of more than 50 people. However, the EO expressly noted that venues that provide *essential goods or services --- such as (BUT NOT LIMITED TO) *grocery stores, pharmacies, gas stations, hospitals, banks and credit unions --- can stay open. ***He has also come out to state that manufacturers can stay open. His list ESSENTIAL BIZ was not meant to be exclusive. (IN Governor has issued similar directives.)
“Shelter in Place” Orders… i.e. San Francisco, excludes:

- Health care operations, including home health workers.
- Essential Infrastructure, including construction of housing and operation of public transportation and utilities.
- Grocery stores, farmers' markets, food banks, convenience stores.
- Businesses that provide necessities of life for economically disadvantaged individuals and shelter facilities.
- Pharmacies, health care supply stores and health care facilities.
- Gas stations and auto repair facilities.
- Banks.
- Garbage collection.
- Hardware stores, plumbers, electricians and other service providers necessary to maintain the safety, sanitation and essential operation of residences and other essential businesses.
- Educational institutions, for the purposes of facilitating distance learning.
- Laundromats, dry cleaners and laundry service providers.
- Businesses that ship or deliver groceries, food and goods directly to residences.
- Child care facilities providing services that enable essential employees to go to work.
- Roles required for any essential business to "maintain basic operations," which include security, payroll and similar activities.

THIS IS NOT EXHAUSTIVE!!!
Workplace Practices

- Immediately send home employees who appear to be ill (particularly, Fever, Cough, Shortness of Breath, Body Aches) upon arrival to work or during the day.
- Emphasize coughing/sneezing etiquette and hand hygiene.
- Implement a NO CONTACT policy.
- Try and implement remote working arrangements to the extent greatest possible. ***You may have no choice in coming days...***
- Try and separate workers in the office or plant with the 6-feet rule.
- NOTE: More employers are requiring TEMPERATURE scans at the start of each shift. ***While we do not necessarily recommend, it is becoming more common – at least instructing workers to check their own temperature each day before arriving to the workplace.
- Encourage private transportation to and from work.
- Close off the break room or café.
- Stagger shifts more --- less bodies using certain facilities at certain times (i.e., Locker rooms).
Workplace Environment

- Provide tissues, no-touch disposal receptacles, soap and water, and alcohol-based hand rubs with at least 60% alcohol.
- Perform routine environmental cleaning of all frequently touched surfaces and provide disposable wipes so that commonly used surfaces can be wiped down before use (e.g. conference tables, reception areas).
- PPE considerations --- gloves, masks, eye protection - particularly on manufacturing, assembly lines.
An employee who thinks they may have been exposed...

- Employees who have a sick family member at home with COVID-19 should notify HR.

- If an employee is confirmed to have COVID-19, the employer should inform fellow employees of the possible exposure but maintain confidentiality. Contact local health department for guidance --- but you do not have to shut down. For now... this can be managed. (see next slide)

- Exposed employees should refer to CDC guidance for how to conduct a risk assessment of their potential exposure. KNOW THE SYMPTOMS. (see next slide)
If an Employee tests positive (or, presumed to have the virus by a health care provider)...  

- Have employee identify anyone they worked closely with in the prior 14 days (including customers and vendors)  
- Undertake a deep cleaning of affected workspaces  
- If shared building or area, notify building management so they can take any precautions they deem necessary  
- Employees with contact to the Employee who tests positive or is presumed to have the virus must monitor themselves for the development of any of the following symptoms: fever (temperature of 100.4 or higher), cough, aches, or difficulty breathing. If they develop any of these symptoms, they must contact a health care provider and stay home until the doctor says they can return to work or are free of fever, signs of a fever, and any other symptoms for at least 24 hours, without the use of fever or other symptom reducing medication, whichever is later. **May want to demand both!!!
OSHA Considerations

- OSHA regulates all employers.
- Both general and industry specific standards regarding employee safety in the workplace.
- No specific rule mandating precautions employers need to take to protect workers from COVID-19
- OSHA expects employers to follow the “general duty clause” of the Occupational Safety and Health Act, which says workplaces must be free of known hazards that can be corrected
OSHA Tracking Requirements

- OSHA requires employers with 10 more workers to keep a log of every workplace injury or illness that requires medical treatment beyond first aid or keeps a worker away from work for at least one day.
- Guidance issued in early March requires employers to track COVID-19.
- If an employer doesn’t know whether the illness occurred at work, OSHA rules say the employer must evaluate the employee’s work duties and environment to decide whether exposures at work either caused or contributed to the illness.
Colds or flu do not need to be tracked (specific exemption).

For workers who decide not to come to work because they have cold/flu symptoms, that by itself won’t require employers to track the cases.

If a test later shows worker has COVID-19, the employer would need to consider if the infection was work-related and recordable.
Review Paid Leave Policies

Questions to Ask:

- How does your current policy accommodate personal and family illnesses?
- How will you apply your paid leave policy in the event of a school or child care facility closing?
- In the midst of an epidemic, will you still require the same level of leave substantiation (e.g., doctor's notes) that it normally requires?
- Do you relax your “no fault” attendance policy? ***Be sure to note that this is purely for the COVID-19 outbreak/pandemic.
- Is the implementation of flexible leave policies an option—even if temporary?
- Do you know and understand all Local, State and Federal paid mandates (existing and those in development – i.e. H.R.6201).
Family Medical Leave Act (FMLA)

- An employee could potentially qualify for FMLA if the employee becomes seriously ill from COVID-19 or is caring for a family member that is seriously ill from COVID-19 and all other FMLA eligibility requirements are met.

- Must meet the FMLA definition of a “serious health condition”
Serious Health Condition

Under the FMLA, a serious health condition must fall into one of these six categories:

- inpatient care;
- incapacity for more than three days with continuing treatment by a health care provider;
- incapacity relating to pregnancy or prenatal care;
- chronic serious health conditions;
- permanent or long-term incapacity; and
- certain conditions requiring multiple treatments.
So... is Coronavirus a serious health condition?

Probably... and, if a health care provider orders someone to self-quarantine --- then it’s very likely FMLA will apply.

- FMLA regulations define “serious health condition” expansively, stating that: “an illness, injury, impairment or physical or mental condition that involves inpatient care ... or continuing treatment by a health care provider.”

- “Continuing treatment” includes incapacity of more than 3 days that involves treatment 2 or more times within 30 days of the first day of incapacity, or treatment by a health care provider on at least one occasion, which results in a regimen of continuing treatment. **Treatment may be by phone.**
Serious Health Condition

- There are certain ailments that don't typically qualify as serious health conditions under the FMLA, including:
  - colds and flu, earaches, upset stomachs and minor ulcers, headaches (other than migraines)

- FMLA rules provide: “ordinarily, unless complications arise, the common cold, the flu ... are examples of conditions that do not meet the definition of a serious health condition”
ADA Considerations...

Consider:

- Regarded as disabled
- Complications arising out of COVID-19
- Permanent effects of the illness
- Association discrimination is a viable theory
FMLA/ADA Compliance
Recommendations & Strategies

- **Be aware** of FMLA and/or ADA issues (remember, requests do not need to specifically mention the "FMLA" or "ADA")
- **Engage** the employee in the interactive process – specifically as it relates to the employee's ability to perform the job (ongoing requirement)
- **Involve your HR team!!** (They know the law and need to respond within statutory time frames!)
- **Be consistent** in your treatment of employees – treat all potentially communicable illnesses similarly (and rationally)
Employee Pay During Time Off

- If an employee is absent due to illness or quarantine and is not performing any work, an employer can require the employee to use accrued sick leave or other paid time off.
- If an employee has exhausted paid time off, and an employer is not able to provide additional paid leave, the employer is not generally legally obligated to pay the employee for the time off. ***Certain limits apply to Salary/Exempt Workers --- those falling under a paid sick leave policy can have pay docked for missing full days due to illness --- some states (i.e. CA) have limited this a bit.***
Wage/Hour Considerations

- **Nonexempt Employees:**
  - Time away from work can be unpaid (subject to leave policies)
  - No hours = no pay (absent contract, CBA or unique local or state law in limited, rate circumstances)
  - All hours worked must be recorded and submitted by the worker if permitted to work remotely

- **Exempt Employees:**
  - Time away from work can be generally unpaid as long as it is in full-day increments if it is voluntary and initiated by exempt employees
  - For time off mandated by employers, the time away from work for exempt employees can be unpaid IF in full-week increments (i.e. Furloughs)
  - Generally, an exempt employee must be paid weekly salary for any week in which she performs ANY work. (i.e. Furloughs)
Furlough vs. Layoff

- More employers, right now, are utilizing temporary furloughs vs temporary layoffs.

- Layoffs = termination event. ***eligible for UI benefits and all earned wages at time of separation (i.e. PTO)

- Furloughs = employment remains intact. ***eligible for UI benefits but employment relationship has not been severed

***Please check your underlying health/welfare and retirement plan documents to ensure you understand the impact of the difference here.

***Employers can also modify wage rates/salaries --- provided it is not a common occurrence and prospective.
Short-Term Disability Benefits

- Employees who become ill with the virus *may* be eligible for benefits under a short-term disability policy, depending on the terms of the policy (i.e. waiting period, covered illnesses).

- Typically disability policies do not provide benefits when an employee is unable to work due to quarantine.
Unemployment Benefits

- Employer-instituted quarantines, temporary shutdowns or mass layoffs could entitle workers to unemployment benefits
  - Depends on the size and length of the temporary shutdown
  - Other unemployment requirements must be met

***NOTE: An employee refusing to work due to FEAR of catching the virus is (at this time) will likely be deemed as REFUSING SUITABLE WORK and, therefore, ineligible for UI benefits. BUT... note that the Plaintiff’s Bar is looking at this as a possible “RETALIATION” theory down the road.
Labor Relations Considerations

- Employers operating in a unionized work environment have additional concerns regarding planning.
- Unionized employers should closely review their collective bargaining agreements to determine whether special provisions have been made in the event of a disruption of business operations.
- For example, some agreements may have provisions that provide paid time off to union workers in the event of an emergency when employees are prohibited from reporting to work.
Worker’s Compensation

If an employee contracts COVID-19 from a coworker will he qualify for worker’s compensation benefits?

- Typically not.
- Depends on whether the illness or exposure “arose out of employment” and was “in the course and scope of employment.” ***Difficult to prove.
- The type of worker and the workplace environment are critical factors in making this decision (i.e. healthcare workers may qualify).
Fear of Infection

- An employer is not required to accommodate employees’ fear of infection – (however, this could lead to treatment for anxiety, depression, etc... --- be careful)

- Employees do not have a right to work from home if the business does not accommodate the practice
  - Balance business needs with the decreased risk of infection to the workforce and community
What’s the Interplay with WARN?

- Federal WARN requires employers to provide displaced workers, certain 3rd parties (i.e. representative union) and government bodies an advanced 60 day Written Notice for a plant closing or a mass layoff. A plant closing is defined as 50 or more employment losses at a single site of employment in a 90-day period that results from ceasing operations in one or more operating units. A mass layoff is defined as 50 or more employment losses at a single site of employment in a 90-day period that also involves 33% of the active workforce at the site. NOTE: Employees with less than 6 months of service in the prior 12 months, or who work less than 20 hours per week, are not counted.

- Temporary layoffs of less than 6 months are not counted as an employment loss under Fed WARN.

- NOTE: Some states have their own mini-warn laws that require notice of 30, 60 or 90 days --- and some states still consider temporary/short layoffs for purposes of its mini-warn law (i.e. CA).
What’s the Interplay with WARN?

- Under the current circumstances, the timing requirement will likely not be possible --- and, it’s probable the timing requirement would not cause any legal issues for employers due to any one of the 3 general Federal WARN exceptions to the timing requirement:
  1) faltering company,
  2) unforeseen business circumstances, or
  3) natural disaster.

  **BUT… NOTICE is still required to be given!!!**

- Also, some states don’t have certain exceptions in their mini-warn laws (i.e. CA does not recognized the “unforeseen business circumstances” exception).

***Know the differences between layoffs/RIFs vs. furloughs. AND note, a furlough could still trigger WARN issues --- depending on the length of the furlough and/or the location of the worksite.***
Additional Considerations

- Consider a review of insurance policies in regards to business interruption and third party claims.
- Evaluate technology infrastructure to determine extent of remote access that can be supported.
- Review business continuity plans to ensure situation presented by COVID-19 is addressed.
- Review borrowing needs (i.e. lines of credit) and review financial obligations carefully (i.e. bank covenants).
- Read our BLOG page for updates...
THANK YOU!

SA COVID-19 WORKPLACE TASK FORCE

MANAGEMENT-SIDE
LABOR & EMPLOYMENT COUNSEL
and
HEALTHCARE COUNSEL

Information included in this slide deck is up-to-date as of March 19, 2020 and does not constitute medical advice.

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